

STATE OF ALASKA

DEPARTMENT OF LAW

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December 21, 2010

VIA CERTIFIED MAIL

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Rowan W. Gould
Acting Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240

**Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act
Regarding the U.S. Fish and Wildlife Service's Designation of Critical Habitat for
the Polar Bear (*Ursus maritimus*)**

Dear Secretary Salazar and Acting Director Gould:

Pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), the State of Alaska ("Alaska" or "State") notifies you of the State's intent to file suit against the U.S. Fish and Wildlife Service ("Service") in 60 days time for violations of ESA sections 3, 4, and 6, and the ESA's implementing regulations, regarding the Service's designation of critical habitat for the polar bear, 75 Fed. Reg. 76086 (Dec. 7, 2010) ("Designation").

I. Introduction

The Service's final polar bear critical habitat designation identified an unprecedented 187,157 square miles of critical habitat, an area larger than 48 of the 50 states. 75 Fed. Reg. at 76086. Never before has the Service interpreted its authority to designate such a vast expanse of critical habitat for a species.

The Service acknowledges that the Designation will not provide significant additional conservation measures for the polar bear. *See* 75 Fed. Reg. at 76093, 76103. The polar bear and its habitat are already well managed and conserved by Alaska, international agreements, conservation programs, and state and federal laws, including the Marine Mammal Protection Act ("MMPA"). *See id.* at 76101 (listing laws and regulations addressing management and conservation of the polar bear). These and other measures make the polar bear one of the most protected species in the world.

As the Service notes, the primary claimed threat to the species—decline in sea ice due to climate change—would not be alleviated by designation of critical habitat for the polar bear. *See* 73 Fed. Reg. 28212 (May 15, 2008) (final rule listing polar bear as threatened under the ESA, providing that decline in sea ice due to climate change threatens the polar bear); 75 Fed. Reg. at 76116 (“the underlying causes of climate change are complex global issues that are beyond the scope of the [ESA]”); *id.* at 76101 (“there are no known regulatory mechanisms that are directly and effectively addressing reductions in the sea ice at this time”). Effectively then, the Designation (1) provides no added conservation benefit for the polar bear, and (2) fails to address the main threat to the polar bear.

What the Designation does do is impose another layer of costly regulation on Alaska, its citizens, and its economy. Alaska’s sovereign interests in its lands and natural resources, which include both the polar bear and the conservation and development of the State’s other resources, including oil and gas, are injured by the final rule. *See* 75 Fed. Reg. at 76121 (showing State ownership of lands and waters designated as critical habitat). The Designation further displaces Alaska’s ability to craft its own mitigation and conservation programs for polar bears. The Designation also imposes requirements on the management of State lands and resources, and imposes requirements on oil and gas activities, transportation, and other projects which may deter others from pursuing such activities and result in decreased State tax and royalty revenues.

Alaska provided comments to the Service on December 28, 2009, and July 6, 2010, in response to the proposed initial habitat designation, and to assist in the development of the Designation. The Service did not completely or adequately address the full scope of those comments.

In designating critical habitat for the polar bear, the Service also failed to fully or adequately follow the ESA’s substantive and procedural requirements, 16 U.S.C. §§ 1532(5), 1533(a), (b), (i), 1535, and its implementing regulations, 50 C.F.R. §§ 424.12, .14. Pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), the grounds for Alaska’s intended action are further detailed below.

II. The Designation Does Not Meet the ESA’s Requirements for Designating Critical Habitat, Making Decisions Based on Best Science, and Adequately Considering Alaska’s Comments.

The ESA directs the Service to designate critical habitat, to the extent determinable, for species listed as endangered or threatened under the Act. 16 U.S.C. § 1533(a)(3)(A). The ESA defines “critical habitat” as

(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A). Except in special circumstances as determined by the Service, “critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.” *Id.* § 1532(5)(C).

The designation is required to be based on “the best scientific data available” considering “the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” *Id.* § 1533(b)(2). Any area otherwise qualifying for designation as critical habitat may be excluded from designation if the benefits of excluding the area outweigh the benefits of including the area, unless excluding an area would result in the extinction of the species concerned. *Id.* The Service may decline to designate critical habitat if doing so would not be prudent (*i.e.*, where publicizing the location of a species is likely to lead to illegal collection) or where critical habitat is not determinable. *Id.* § 1533(a)(3)(A); *see also* 50 C.F.R. § 424.12(a).

The critical habitat rulemaking is to be based on a determination that the geographical areas designated possess the physical and biological features essential for the conservation of the species. *See* 50 C.F.R. § 424.12(b). Lastly, areas outside the geographical area presently occupied by a species may be designated as critical habitat “only when a designation limited to [the species’] present range would be inadequate to ensure the conservation of the species.” *Id.* § 424.12(e).

A. The Designation Fails to Adequately Establish that Areas Included in the Designation Possess Physical and Biological Features Essential to the Conservation of the Polar Bear.

The Service has designated 187,157 square miles of Alaska and its adjacent coastal waters as critical habitat for polar bear. 75 Fed. Reg. at 76086. This is the largest area of critical habitat ever designated for a species. The evidence presented in the Designation is insufficient to substantiate the need to designate nearly the entire occupied range of polar bears in the United States as essential for their conservation.

Critical habitat under the ESA, by definition, includes “specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). The “physical or biological features” that satisfy the ESA’s requirements are termed Primary Constituent Elements (“PCEs”). 50 C.F.R. § 424.14(b)(5). PCEs must be “found” on occupied land before that land can be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i). “That PCEs must be ‘found’ on an area is a prerequisite to designation of that area as critical habitat.” *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 122-23 (D.D.C. 2004). The Service is prohibited from over-designating habitat and must instead “mount[] the proper effort to ensure that PCEs do exist on designated lands.” *Id.* at 122-23. “The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation.” *Id.*

The 187,157 square miles of designated habitat improperly includes vast areas that do not contain any PCEs. There are also vast areas that the Service has designated without ensuring that PCEs actually exist on the designated lands. For example:

- Designation of all areas where sea ice may occur in water depths less than 300 meters, regardless of the actual presence of sea ice and seasonal and annual changes to sea ice.

See 75 Fed. Reg. at 76121, 76133. This area of 179, 508 square miles is identified as critical sea ice habitat, but includes areas that have no sea ice or so little sea ice during certain seasons of the year that they do not possess physical or biological features essential to the conservation of the polar bear.

- The inclusion of areas such as Norton Sound as critical sea ice habitat that are not even within the range of the species as mapped.
- Designation of barrier island critical habitat, including a one-mile “no disturbance zone” which includes barrier islands, barrier island habitat and surrounding areas that lack suitable topography or other habitat features necessary to essential polar bear behaviors. *See* 75 Fed.Reg. at 76122, 76136. For example, the Service has designated barrier island habitat that consists of aggrading, primarily gravel islands (*e.g.*, Stump, Egg, Challenge, and Gull islands) that are low profile and used primarily for loafing and movements along the coast. This habitat is of limited conservation value. Likewise, the Service designated barrier island habitat with little or no apparent documented use by polar bears in recent decades (*e.g.*, Norton Sound to Hooper Bay). This is not critical habitat.
- Designation of the entirety of St. Lawrence Island as critical habitat where there is little or no documented use of the inland portions of the island.
- Designation of critical habitat for denning 20 miles inland east of the Canning River when documentation indicates that almost all historical denning has occurred within 10 miles of the coastline.
- Designation of 5,657 square miles of land along the northern coast of Alaska as terrestrial denning critical habitat for the polar bear. *See* 75 Fed. Reg. at 76121-22, 76134. The majority of this area is not suitable for polar bear denning.
- Designation of terrestrial denning critical habitat and barrier island critical habitat which includes areas in close proximity to existing human and industrial activity that are unsuitable for polar bear denning, resting, and other behaviors.

The Service’s approach to designating critical habitat for the polar bear also differs from its approach to designating critical habitat for other migratory or landscape species. For example, the Service defined critical habitat for the spectacled eider and Steller’s eider according to important life history attributes. Yet not every area where these birds might be found in Alaska lands and waters was defined as critical habitat. Another example is the recently designated critical habitat for northern sea otters, where the Service designated a narrow strip of coastal habitat that offered protection from killer whale predation rather than designating the entire occupied range.

Generally, “critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.” 16 U.S.C. § 1532(5)(C). Contrary to the Service’s past approach to designating critical habitat, and contrary to the ESA’s limitations on critical habitat, the Service has designated nearly the entire geographical area which could be occupied by the polar bear. Such action does not comply with the ESA.

B. The Designation Improperly Includes Areas that Do Not Meet the Definition of Critical Habitat Because They Do Not Require Special Management Measures.

Under the ESA, critical habitat consists of specific areas whose physical or biological features are “essential to the conservation of the species” and “*which may require special management considerations or protections.*” 16 U.S.C. § 1532(5)(A) (emphasis added). Those areas which do not require “special management considerations or protections” are not “critical habitat” and are not to be designated as such under the ESA. *Id.*

The Service has failed to adequately explain why special management considerations or protections may be required in many of the areas designated as critical habitat. “Special management considerations or protection” means “any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.” 50 C.F.R. § 424.02. The Service does not directly address “the crystal clear statutory requirements that PCEs must be those that may require special management considerations or protection.” *Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 124. The Service can only designate critical habitat if it first makes a finding that the listed species’ habitat “may require” special management considerations or protections. *Id.* The Service failed to consider this requirement in a meaningful way, beyond providing conclusory statements, which is insufficient. *Id.* (Service must consider requirement in “meaningful way” and must provide more than “conclusory statement” in discussion of how each identified PCE would need management or protection).

Further, the Service does not adequately explain how its conclusion that the Designation will result in “no significant additional conservation measures” makes sense in light of its decision that “special management considerations and protections” are required for conservation of the polar bear. *See* 75 Fed. Reg. at 76093; *see also id.* at 76118 (discussing the great level of protection for the polar bear provided under the MMPA); *id.* at 76101 (discussing existing regulatory mechanisms). If the Designation’s three proposed polar bear critical habitat units already have sufficient federal, state and local regulatory measures and protections for the polar bear, such that the Designation will not result in additional conservation measures, then no “special management considerations and protections” supplied by the critical habitat designation would be required. If “special management considerations and protections” are indeed required, thereby triggering the designation of critical habitat, then the Designation must be adding conservation measures. Determining that there is a need for “special management considerations and protections” to be satisfied through the Designation, while at the same time concluding that the Designation would not add conservation measures is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or without observance of procedure required by law, in violation of ESA sections 3 and 4.

C. The Designation is Not Based on the Best Scientific Data Available.

Critical habitat designations are required to be based on “the best scientific data available” considering “the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). Further, when an agency uses a model in its decision-making process, it must “explain the assumptions and methodology used in preparing the model and, if the methodology is challenged, must provide a complete analytic

defense.” *United States Air Tour Ass’n v. F.A.A.*, 298 F.3d 997, 1008 (D.C. Cir. 2002) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983)). An agency’s use of a model is arbitrary if it has no rational relationship to the reality it purports to represent. *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 198 (D.D.C. 2008).

The Service failed to explain its assumptions and show how those assumptions influenced the Service’s sea ice modeling analysis, and did not show how the modeling comported with reality. Specifically, as addressed above in Section II.A., the Service has violated the ESA’s best science requirement by over-designating vast areas as critical habitat. The best scientific data available demonstrate that only a very small and readily identifiable fraction of these areas contain polar bear PCEs. For example, the Service has designated huge areas as critical sea ice habitat that do not possess physical or biological features essential to the conservation of the polar bear. Likewise, large areas of terrestrial habitat are designated as critical habitat when polar bears rarely, if ever, are found in such habitat. *See* 75 Fed. Reg. at 76089, 76111 (explaining that “pack ice is the primary summer habitat for polar bears in the United States” and most “polar bears remain on sea ice year-round”); *id.* at 76089 (“the majority of land locations were of polar bears occupying maternal dens during the winter”). The Service has also designated areas outside the range of the species as mapped, areas including terrestrial and barrier island areas with little value for denning, and barrier islands that have little to no documented use by polar bears.

In the Designation, the Service designates all areas where sea ice may occur in water depths less than 300 meters, regardless of the actual presence of sea ice and seasonal and annual changes to sea ice. *See* 75 Fed. Reg. at 76121, 76133. However, the Designation provides that polar bears select areas of sea ice habitat meeting the following three criteria: (a) greater than 50 percent ice concentration, (b) near leads, open water, or permanent or ephemeral polynyas, and (c) in water depths of less than 300 meters. *See id.* at 76111. Rather than developing a system for determining when ice meets these criteria, the Service simply chose only one of these three criteria—that sea ice be located in water less than 300 meters—as essential to the conservation of the polar bear. The Service failed to adequately explain and substantiate its reasons for excluding the other two criteria.

Additionally, the Service’s chosen methodology for determining sea ice critical habitat failed to adequately consider annual and seasonal changes to sea ice. The Service did not explain how these changes affect sea ice critical habitat or adequately explain how its methodology results in designation of critical habitat that does not possess physical or biological features essential to the conservation of the polar bear for extended periods of time.

Of further concern, in the Service’s listing decision, neither denning nor general rearing were identified as factors that necessitated the need to list the polar bear under the ESA. *See* 73 Fed. Reg. 28212; *see also* 75 Fed. Reg. at 76113 (“cover and shelter are not considered to be limiting factors for the conservation of polar bears in the United States”). Their use as primary factors in designating critical habitat is thus unsubstantiated. The Service failed to explain why these factors were essential to conservation of the polar bear when designating critical habitat, but not essential or not requiring special management measures when listing the species. Insufficient data have been provided to justify the need to designate Units 2 and 3 in their entirety as critical habitat.

Lastly, the Service has failed to properly assess the economic impact of critical habitat designation for the polar bear, and other relevant factors, based on the best available scientific data. And, the Service has also failed to exclude areas from critical habitat designation based upon the best

available scientific data. These deficiencies violate ESA section 4 and are discussed further below in Sections II.D. and II.E.

D. The Service Failed to Adequately Consider the Economic Impact of the Designation.

Section 4(b)(2) of the ESA requires the Service to “designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2). The ESA requires the Service to base critical habitat determinations not only on the “best scientific data available,” but also to consider the economic and other impacts of specifying any particular area as critical habitat, balancing the cost to society against the benefits to the species. Also, pursuant to the Service’s regulations for critical habitat designation, a designation is not prudent where it “would not be beneficial to the species.” 50 C.F.R. § 424.12(a)(1)(ii). If the benefits of excluding an area from designation outweigh the benefits of including it as critical habitat, the Service may exclude it from designation if doing so would not result in the listed species’ extinction. 16 U.S.C. § 1533(b)(2).

In the economic analysis employed in the Designation, the Service used the “baseline” approach to evaluate the economic impacts of critical habitat designation, when it should have used the “coextensive approach.” The “baseline” approach considers only those economic impacts attributable solely to a critical habitat designation, and does not include the costs or impacts attributable to or arising from both the designation and the original listing decision. In contrast, the “coextensive” approach previously used by Service in some instances considers all economic impacts of a designation, even those coextensively attributable to the listing of a species. Alaska recognizes that some disagreement exists among the federal courts as to the scope of the critical habitat economic impact analysis required by the ESA. *See, e.g., New Mexico Cattle Growers’ Ass’n v. Fish and Wildlife Serv.*, 248 F.3d 1277, 1283-85 (10th Cir. 2001) (directing use of “coextensive” approach and setting aside FWS reliance on baseline approach); *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1172-74 (9th Cir. 2010) (upholding use of “baseline” approach). However, for the reasons noted in the *New Mexico* case and others in that line of authority, the Service should have used the co-extensive approach. The Service’s failure to apply this approach in the economic analysis caused the Service to analyze an incorrectly limited scope of economic impacts.

Even under the baseline approach used by the Service, the final economic analysis is overly narrow and does not reasonably consider the relevant factors under 16 U.S.C. § 1533(b)(2). For instance, the Service failed to adequately document or explain the basis for and assumptions applied in limiting the scope of the analyses underlying its proposed critical habitat designation for the polar bear, including its assumption that the polar bear critical habitat designation is not expected to “result in additional significant conservation measures.” *See* 75 Fed. Reg. at 76093, 76103; Final Econ. Analysis at 2-9 (“we do not expect that designation of critical habitat will result in additional significant conservation actions”). This statement indicates that the designation of critical habitat by the Service is not prudent, in terms of its benefit to the species as required under the ESA. *See* 50 C.F.R. § 424.12(a)(1)(ii) (a designation is not prudent where it “would not be beneficial to the species”).

Next, the Service did not adequately consider the economic impacts of the additional consultations or portions of consultations and project requirements and modifications that the adverse modification standard imposes. *See Arizona Cattle Growers' Association*, 606 F.3d at 1174 (indicating that adverse modification standard may create additional economic impacts beyond listing). Also, the Service failed to adequately consider the impact on national security, and any other relevant impact, of specifying any area as critical habitat. 16 U.S.C. § 1533(b)(2) (requiring consideration of these impacts). The Service's economic analysis underestimates the costs of conducting consultations and fails to properly account for other costs, including but not limited to costs of litigation, project delay, project slippage, deferred production or closure, uncertainty and risk. *See, for example*, 75 Fed. Reg. at 76107 (Service states that "potential for indirect impacts, such as litigation, uncertainty, and project delays, is real[,] but fails to analyze such impacts). The economic impact to the oil and gas industry, construction and development, and commercial shipping and marine transportation are likewise underestimated. *See, for example, id.* at 76106 ("the FEA does not include a regional economic impact analysis of reduced oil and gas activity"); *id.* at 76126 ("[t]he economic impacts of critical habitat designation on commercial shipping and marine transportation . . . were not estimated").

In sum, reasonably identifiable and certain economic impacts attributable to the Service's designation of polar bear critical habitat are underestimated by the Service's economic analysis. These shortcomings resulted in a deficient critical habitat designation by the Service, in violation of ESA section 4.

E. The Service Failed to Properly Weigh the Benefits of Designating Versus Excluding Certain Areas in Its Designation.

If the benefits of excluding an area from designation outweigh the benefits of including it as critical habitat, the Service may exclude it from designation. 16 U.S.C. § 1533(b)(2). As previously stated, consideration of whether to designate certain areas includes consideration of "the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* The Service failed to determine whether the benefits associated including certain habitat were outweighed by the benefits of excluding that habitat. The Service also failed to adequately consider the negative impacts of the Designation on the State and national economy and on national security, among other impacts.

From an economic standpoint, the Designation affects the following activities of State interest:

1. Oil and Gas Leasing in the Beaufort Sea and North Slope Planning Areas--DNR's current 5 year plan is for area-wide oil and gas lease sales for the Beaufort Sea and North Slope planning areas, scheduled for 2010, 2011, 2012, and 2013;
2. Existing pipelines, roads, and other industry and local infrastructure projects;
3. Ports and coastal infrastructure and shipping;
4. Coastal Impact Assistance programs; and
5. Local governments.

Although the Service excluded some existing manmade structures within oil fields, *see* 75 Fed. Reg. at 76097, and the communities of Barrow and Kaktovik, *id.*, the Service did not adequately consider the impact of the Designation on all of these activities. Yet, the Designation recognizes that the “sum total of documented direct impacts from these activities [oil and gas exploration, development, and production onshore and offshore, and potential increases in shipping] in the past has been minimal.” 75 Fed. Reg. at 76117, 76118. And, the Designation notes that regulatory and monitoring programs for these activities already reduce any potential effects. *Id.*

Likewise, the Service did not adequately consider the economic impacts, the impact on national security, and other relevant impacts of the critical habitat designation for the activities and lands listed below. The impacts to these activities and lands are so detrimental to certain State and national interests that the activities should have been considered for exclusion, and excluded by the Service. The benefits of excluding these areas from designation far outweigh the benefits of including them as critical habitat.

- All State land onshore and offshore between the Canning River (ANWR) boundary and the Colville River (NPRA) boundary, that includes the following oil and gas units; Point Thomson, Arctic Fortitude, Badami, Beechey Point, Colville River, Dewline, Duck Island, Kuparuk River, Liberty, Milne Point, Nikaichuq, Northstar, Oooguruk, Prudhoe Bay, Rock Flour, and Sakkan.
- State and federal offshore oil and gas leases that have economic and national security interests. The OCS is important to the future of the State because it provides throughput through the TransAlaska Pipeline System which benefits the State.

Nowhere in the Designation did the Service find that the benefits of including these lands, and other lands, outweigh the benefits of excluding them from designation as critical habitat, as ESA Section 4(b)(2) requires. The Service’s failure to meaningfully engage in this balancing analysis and to rationally explain its conclusions as to why these lands were included in the Designation violated the requirements of the ESA.

F. The Service Failed to Fully Coordinate the Designation with the State and Failed to Provide Adequate Justification for Designation of Critical Habitat Inconsistent with the State’s Comments.

Congress intended states to have an important role in the ESA’s implementation. The Senate Report on the legislation that ultimately became the 1982 Endangered Species Act amendments highlighted the requirement that the Service provide a state agency with actual notice of any proposed regulation concerning the listing of species, and invite the comment of that agency on the proposed regulation, just as is required in the enacted version of ESA Section 4(i).

As that Senate Report noted: “[t]he involvement and advice of such State agencies in the Federal regulatory process is crucial *and must not be ignored*.” S. Rep. No. 97-418, at 12 (1982) (emphasis added). Similarly, in the promulgation of the ESA listing regulations in 1984, the Service noted that the requirement in 50 C.F.R. § 424.18(c) that implements ESA Section 4(i) requires “that State agencies be adequately informed of the basis for any action that is not in agreement with that agency’s recommendation.” 49 Fed. Reg. 38900, 38906 (Oct. 1, 1984). Likewise, in ESA Section 6,

the Secretary is directed to “cooperate to the maximum extent practicable with the States.” 16 U.S.C. § 1535(a).

Next, in the 1994 Notice of Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities, 59 Fed. Reg. 34275 (July 1, 1994), the Service stated that it is the policy of the Service in species listing activities to “[u]tilize the expertise and solicit the information of State agencies in preparing proposed and final rules to: . . . designate critical habitat.”

Thus, both Congress and the Service itself recognized the importance of state agency input and the importance of adequately informing the state agency of the basis of any action not in agreement with the agency’s recommendations or comments. Here, the Service failed to coordinate with the State and its political subdivisions in developing the designation of polar bear critical habitat. Despite Alaska being the only state having polar bears within its jurisdiction, there was no effort to consult in a meaningful manner with the State or its political subdivisions on development of the Designation. The State and its political subdivisions could have provided information useful in development of the Designation if coordination had occurred. For example, the State is one of the best sources for information on potential economic impacts of the critical habitat designation. The Designation would have benefited from fully incorporating the State’s data concerning potential economic impacts.

Also, under ESA Section 4(i), if the Service issues a final regulation that conflicts with comments submitted by a state agency (which under the Act means “any state agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a state”), then the Service “shall submit to the state agency a written justification for [its] failure to adopt regulations consistent with the agency’s comments.” 16 U.S.C. § 1533(i). Here, through its Department of Fish and Game, the State submitted comments to the Service on the proposed designation of critical habitat for the polar bear on December 28, 2009, and again on July 6, 2010. The Service has not provided the required written justification to the State for its failure to adopt regulations consistent with the State’s comments. Among other things, the Service has not provided its written justification to the State for the following items that conflict with the State’s comments:

- The designation of 187,157 square miles of critical habitat, nearly the entire geographical area that could be occupied by the polar bear, without adequately substantiating that this area actually contains the habitat features essential for conservation of the species.
- The Service’s reliance on general climate models to predict future habitat losses, when such models do not employ the best scientific data available in assessing sea ice extent.
- The failure to adequately consider the State’s proposed approach to determine critical habitat by assessing the main conservation threats identified in the listing decision and conducting a temporal and geographic analysis of the occupied species range to determine those areas and time periods that are essential for designation.
- The Service’s failure to adequately consider existing regulatory measures for the conservation of the polar bear in determining whether areas essential to the

conservation of the polar bear actually require special management considerations or protections.

- The Service's failure to exclude the following areas based on a balancing of the benefits of inclusion versus exclusion of these areas as critical habitat: (1) all state land onshore and offshore between the Canning River (ANWR) boundary and the Colville River (NRPA) boundary, and (2) state and federal offshore oil and gas leases that have economic and national security interests.
- The Service's failure to fully or adequately consider the complete economic impacts to the oil and gas industry, construction and development, commercial shipping and marine transportation, and ESA Section 7 consultation activities.

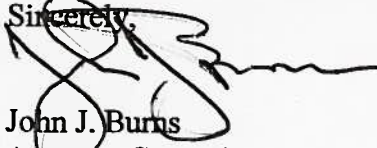
Therefore, the Service violated ESA Sections 4(i) and 6, 16 U.S.C. §§ 1533(i), 1535(a), by failing to adequately coordinate with Alaska on the Designation and consider these comments during its decision-making process, and by not providing the requisite written justification to Alaska.

Conclusion

The purpose of this notice letter is to afford the Department and the Service an opportunity to come into compliance with the ESA's requirements. Please let us know if the Department and the Service intend to do so.

If the Department and the Service decline to do so, then they will be in continuing violation of the ESA's substantive and procedural requirements in designating critical habitat for the polar bear. In that instance, the State of Alaska intends to file suit in 60 days time to challenge these deficiencies. Please contact me with any questions concerning this notice and to discuss possible options to resolve the issues presented here without litigation.

Sincerely,



John J. Burns
Attorney General